IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MARK T. EDDINGSTON,	§	
JEFFERY M. DAVIS,	§	
ELRIDGE NICHOLAS BOLLICH,	§	
and RAY A. COX	§	
	§	**Civil Action No. 2:12-CV-00422**
Plaintiffs,	§	
	§	
V.	§	
	§	
UBS FINANCIAL SERVICES, INC.	§	
	§	
Defendant.		

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BILL HENDRICKS,	§	
AUBREY B. STACY	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**Civil Action No. 2:12-CV-00606**
	§	
UBS FINANCIAL SERVICES, INC.	§	
	§	
Defendant.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION TO COMPEL INTERROGATORY RESPONSES

Plaintiffs file this response to Defendant's motions to compel interrogatory responses (2:12-CV-00422 Dkt. No. 92 and 2:12-CV-00606 Dkt. No. 83) and would show as follows:

I. Introduction.

In addressing Plaintiffs' answers to interrogatories, purportedly propounded to them by Defendant in connection with the class certification hearing in this action set for

June 4, 2013, Defendant complains about Plaintiffs' answers to four of the interrogatories. Defendant claims that the interrogatories are reasonably calculated to discover evidence relevant to Plaintiffs' motion for class certification and thereby intended to flesh out the key facts related to certification (Id., pp. 2, 3). Motion, p. 1. However, all four of the interrogatories seek information relating to the merits of Plaintiffs' common claim, not any certification issues, and Defendant fails to identify how the information sought in the requests is possibly relevant to the certification hearing or to provide any legal authority suggesting that the information is even discoverable in connection with the hearing. Accordingly, Defendant is improperly attempting to use the limited certification-related discovery permitted by the Court to obtain merits-related discovery.

In its attempt to put the cart before the horse, Defendant ignores applicable law. When addressing the issue of certification, this Court need not consider the merits of Plaintiffs' claim beyond determining the existence of common questions among Plaintiffs and other members of the putative class. *See Adv. Comm. Note* to Rule 23(c)(1) ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision."); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S. Ct. 1184, 1194-1195 (2013) ("...Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 277 (5th Cir. 2007) ("…class certification hearings 'should not be mini-trials on the merits of the class or individual claims.'") (*citing Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). As the *Oscar* court observed:

> A court must conduct an "intense factual investigation," yes, and in doing so the district court must often go "beyond the pleadings" and "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." The district court cannot, however, go beyond those issues necessary to decide whether the requirements of Rule 23 are satisfied and rule on merits issues that are unrelated to Rule 23.

Oscar, 487 F.3d at 277 (internal citations omitted).

While some appreciation for the merits may thus arise in connection with the commonality issue, under Rule 23, neither a ruling concerning the required existence of common questions of law or fact, nor the certification process generally, is properly used as occasion for the Court to address in any definitive fashion, much less make a far-reaching determination of, the ultimate merits of the case. *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("[A] district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) ("A court may not say something like 'let's resolve the merits first and worry about the class later' . . . or 'I'm not going to certify a class unless I think that the plaintiffs will prevail.'").

Even if the parties were properly engaged in merits-related discovery, Defendant's motion to compel would still not be well taken.

In the case of two of the four interrogatories at issue, Interrogatory No. 2 and Interrogatory No. 4, all Plaintiffs, despite, objections that the information sought is not pertinent to certification, have answered them. With one exception, noted below, they have actually done so three times, in an original and two amended sets of answers, and provided substantial detail in such amended and supplemental answers. Such answers, other than the second supplemental answers of a single Plaintiff, Aubrey B. Stacy, unavailable at this time, are attached hereto as Exhibits 1-11. Plaintiffs' original answers were attached to Defendant's motion to compel. Two Plaintiffs, Mr. Stacy and Mr. Eddingston, have also provided the information sought by the interrogatories through deposition testimony.

In the case of Interrogatory Nos. 11 and 12, the two other challenged interrogatories, the lack of logic or legal basis for seeking the requested information is apparent for both certification and merits purposes. Nonetheless, in their second amended answers, Plaintiffs (other than Mr. Stacy) have provided responsive information and Mr. Eddingston and Mr. Stacy have already provided deposition testimony.

II. Defendant's Interrogatory No. 2:

> *For each person you believe has knowledge of any of the facts underlying any of the claims in the Amended Complaint or the subject matter of this litigation, please state: (a) full name, last known home and business addresses and telephone numbers, and relationship to you; (b) current employer and position and, if formerly employed by Defendant, state when and what position; (c) the facts or information which you believe to be the substance of his or her knowledge and the source of such knowledge; and (d) the identity of any documents which relate to the person's information or knowledge, including without limitation any written statements.*

All Plaintiffs have (with the single exception noted) answered this interrogatory three times, as evidenced by their original, first and second amended interrogatory answers, and both Mr. Eddingston and Mr. Stacy answered questions encompassing aspects of Interrogatory No. 2 in their depositions. *See, e.g.*, Eddingston (page 39:14-18; 90:16-92:6; 93:14-18; 95:3-21;96:1-9). Defendant nevertheless suggests in its motion that it has been deprived of information. Motion, pp. 7-10. A review of the multiple sets of answers by Plaintiff contradicts this. This is true even though Interrogatory No. 2 on its face deals with information relating to the merits of Plaintiffs' common claim, not the issues of numerosity, commonality, typicality, adequacy and appropriateness for class-action treatment posed by Plaintiffs' motion for class certification. That is to say, Defendant has obtained answers both through depositions and three sets of interrogatory answers, including as requested, identification of documents. Those answers are sufficient.[1]

III. Defendant's Interrogatory No. 4:

> *Identify each person from Defendant who, either individually or as part of a group, communicated with you, orally or in writing, regarding the Plan. For each such person, specify the nature of the communication; the date when the communication took place; what the individual said about the Plan; what statements, if any, you made during the communication; witnesses, if any, to the communication(s); and any notes or documents relating to the communication(s).*

This interrogatory, more narrow than Interrogatory No. 2, directed to Plaintiffs' common claim generally, relates specifically to whether the PartnerPlus Plan at issue is covered by the Employee Retirement Income Security Act ("ERISA"). That question is even more clearly not tied to any issue under Rule 23 of the Federal Rules of Civil Procedure. That is why Plaintiffs have objected to this interrogatory. Defendant,

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1 Defendant claims inadequate Plaintiffs' answers asserting that only they know about the facts supporting their respective individual claim and that it is their employment with Defendant and participation in the Partner Plus Plan and related facts which support such claim. Motion, pp. 7-8. However, such answers are very straightforward and hardly problematic. Similarly, for Plaintiffs to have indicated a belief that other plaintiffs and branch managers may have knowledge of pertinent facts without identifying them is not inappropriate, contrary to Defendant's contention. Id, p.8. Plaintiffs did not need to volunteer that they believed others may have knowledge, but, having done so, certainly are not required to speculate about which plaintiffs or which branch managers may have such knowledge. The same is true of individuals who Plaintiffs believe may be known to counsel who Defendant similarly complains each Plaintiff must disclose (Id., p.8); such information is obviously subject to the work product privilege, and is not required to be disclosed by any individual Plaintiff lacking the same knowledge.

however, other than contending that certification will often "entail some overlap with the merits" (Motion, p. 9), offers no authority or explanation whatsoever to show how this *specific* information is possibly relevant to certification. Wanting the information is not sufficient to justify this Court ordering Plaintiffs to provide it.[2]

Even so, again, Plaintiffs have answered the interrogatory in question. Like the information requested in Interrogatory No. 2, Defendants have already obtained this information through depositions of two representative Plaintiffs and in interrogatory answers by all Plaintiffs. Their answers are again sufficient. With respect to communications with other Plaintiffs (Motion, p.9), except for the fact that Defendant did not await Plaintiffs' fully responsive first amended answers to this interrogatory, Defendant would have realized that Plaintiffs did indicate the circumstances of such conversations, leaving its complaint in that regard without merit.

IV. Defendant's Interrogatory No. 11:

> *Identify all employers (including yourself) who have offered you employment or for whom you have worked since your employment with UBS ended and through the date of trial, identifying: the company name, address, and location; the dates you were employed by such other employers (including yourself); your positions with such employers; your supervisors' names and titles; a brief description of your job duties; your rate of pay as well as earnings, compensation and other benefits you received during such employment; and if you left the employment, the reasons for your separation from employment.*

Again, Defendant offers only general platitudes – not specific arguments or authorities to suggest that this particular information related to subsequent employment of Plaintiffs is relevant to any certification issue. Motion, p. 10. It refers to the nature of the

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[2] Defendant actually ties the motive for Interrogatory No. 4 not to the merits of Plaintiffs' common claim, but to the issue of class waiver already determined by this Court, characterized by Defendant as a defense to the claim. Motion, pp. 9-10. That is a procedural issue no longer an obstacle to pursuit of Plaintiffs' common claim.

PartnerPlus Plan, but again, that is an issue of the applicability of ERISA, only one of the common issues of law underlying the common claim of Plaintiffs, not a certification issue. No authority whatsoever is offered by Defendant to indicate that the issue of applicability of ERISA is a certification issue.

Moving on to the merits of the common claim itself, Defendant asserts information as to subsequent employment is relevant to "mitigation of damages" (Id., p.10), but this is not an employment case or other case of loss of earnings as to which the doctrine of mitigation is applicable. It is an action involving a retirement plan in violation of ERISA, and seeks an injunction against enforcement of an illegal plan or reformation of the illegal plan. One consequence maybe that forfeitures of amounts to which Plaintiffs are entitled under ERISA will have to be reversed and disgorged. Failure to mitigate is obviously not a defense to such a forfeiture requirement. *See, e.g. Schleibaum v. Kmart Corp.*, 153 F.3d 496 (1998) (*citing Leigh v. Engle*, 727 F.2d 113, 139 (7th Cir.1984)). Similarly, mitigation is not an issue in determining whether Plaintiffs' alternative claim under Texas law is valid. No issue of reasonableness of restrictions is involved in that claim, despite Defendant's argument that it is, made to justify Interrogatory No. 11. Motion, p. 11. The issue whether a non-compete agreement imposes "a greater restraint than is necessary" in any event refers to a non-compete agreement's "limitations as to time, geographical area, and scope of activity to be restrained."[3] An employee's subsequent income is simply not a factor in this inquiry. *See, e.g. Drummond Am., LLC v. Share Corp.*, 692 F. Supp. 2d 650, 655 (E.D. Tex. 2010).

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[3] TEX. BUS. & COM. CODE ANN. § 15.50(a); *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994), *abrogated in part on unrelated grounds by Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).

Defendant also suggests that information as to subsequent employment may bear on the need to assess damages individually. If none of such information is relevant to any aspect of damages, it cannot dictate individual consideration of damages.

In all events, as in the case of Interrogatories Nos. 2 and 4, Defendants have obtained responsive information both in depositions of Mr. Eddingston and Mr. Stacy (see, e.g, Eddingston 14:12-14; 15:1-19), and now in second amended interrogatory answers of the remaining Plaintiffs. In addition, as noted by Defendant, Plaintiffs have not sought to quash third-party subpoenas directed in selective instances to subsequent employers of Plaintiffs. Motion, p. 11. Because, in their second amended answers, the other Plaintiffs have provided the names, contact information, and dates of employment for subsequent employers, as well as information about bonuses and forgivable loans provided by such employers, Plaintiffs can simply not be claimed to be uncooperative even if they disagree that the information is relevant or even discoverable.[4]

V. Defendant's Interrogatory No. 12:

> *For all employers identified in response to the foregoing interrogatory, identify and describe your efforts to become employed with such employer, including each person who recruited you; each person who interviewed you; the date you first expressed interest in employment with the employer; your reasons for seeking employment outside UBS; any pre-employment communications with representatives of the employer; any applications or resumes submitted; and your reasons for accepting such employment.*

As set forth above, an employee's subsequent income is not relevant either for ERISA or Texas law purposes even at the merits stage, much less at the class certification stage. Defendants offer no specific explanation or authority demonstrating how the additional information concerning Plaintiffs' subsequent employment sought in Interrogatory No. 12 is any more relevant to the certification decision. Nonetheless, Defendants have already been provided responsive information through depositions or written interrogatory answers of all Plaintiffs.

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[4] Defendant also complains that certain information partially obtainable through public access has not been provided. In the depositions of two Plaintiffs and answers of the remaining Plaintiffs, it has been provided.

WHEREFORE, Plaintiffs pray that this Court deny Defendant's motion to compel responses to interrogatories and for other and further appropriate relief.

Respectfully submitted,

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This is to certify that a true and correct copy of the foregoing was served upon Defendant's counsel of record through this Court's electronic filing system this 25th day of May, 2013 as follows:

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